90-1919

No.

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAWRENCE S. KRAIN, M.D.,

Petitioner,

v.

JERRY HICKS, TIMES MIRROR CORPORATION, TOM JOHNSON, COUNTY OF ORANGE, et al.; and TED MILLARD, TOM JOHNSON, ALFRED GOODWIN, RONALD REAGAN, EDWARD WALLIN, RODERICK PONATH, et al.; and DONALD SMALLWOOD, LYNN WATERS, KATHLEEN O'LEARY, LUPE TORRES, MAURICE EVANS, CAROLYN ALBERTY, JOHN TROTTER, COUNTY OF ORANGE, KITTY LOVE, MARY LITTRELL, PAUL MAST, ORANGE COUNTY MEDICAL ASSOCIATION, MARK WRAY, et al.; and BRENT SUNDIN, JAMES ALFANO, RICHARD BEACOM, ROBERT FITZGERALD, GERALD O'DONNELL, TIM MILLER, BRAD GATES, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit U.S. Supreme Court 12.2 Case

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the 9th Circuit Court of Appeals err in Case No. 90-55265 by failing to note proper proofs of service on file and in the record, especially since Federal Rule of Civil Procedure 4(g) is applicable?

2. Do *United States v. Ayer*, 857 F.2d 881 (1st Cir. 1988) and *Ruiz Varela v. Sanchez Veloz*, 814 F.2d 825 (2nd Cir. 1987) and *Morse v. Elmire Country Club*, 752 F.2d 35, 39 (2nd Cir.) differ significantly from *Worrell v. B.F. Goodrich*, 845 F.2d 840 (9th Cir.), and should this Court resolve the conflicts in interpretation of Federal Rules of Civil Procedure 4(c) and specify to what extent Federal Express receipts may be accepted as certified mail receipts in the light of world modernization?

3. To what extent does this Court intend to resolve federal circuit conflicts regarding the elements necessary to dismiss a complaint with or without prejudice on the basis of competency of a litigant?

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IN THE

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OCTOBER TERM, 1990

LAWRENCE S. KRAIN, M.D.,

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JERRY HICKS, TIMES MIRROR CORPORATION, TOM JOHNSON, COUNTY OF ORANGE, et al.; and TED MILLARD, TOM JOHNSON, ALFRED GOODWIN, RONALD REAGAN, EDWARD WALLIN, RODERICK PONATH, et al.; and DONALD SMALLWOOD, LYNN WATERS, KATHLEEN O'LEARY, LUPE TORRES, MAURICE EVANS, CAROLYN ALBERTY, JOHN TROTTER, COUNTY OF ORANGE, KITTY LOVE, MARY LITTRELL, PAUL MAST, ORANGE COUNTY MEDICAL ASSOCIATION, MARK WRAY, et al.; and BRENT SUNDIN, JAMES ALFANO, RICHARD BEACOM, ROBERT FITZGERALD, GERALD O'DONNELL, TIM MILLER, BRAD GATES, et al.,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit U.S. Supreme Court 12.2 Case

PETITION FOR WRIT OF CERTIORARI

BEST AVAILABLE COPY

PRAYER

Petitioner Lawrence S. Krain, M.D., respectfully prays that a writ of certiorari issue to review the judgment and order of the 9th Circuit Court of Appeals in this case on April 18, 1991.

OPINIONS BELOW

The opinion of the 9th Circuit Court of Appeals is not published in the official reporters; the Court's opinion denying review is attached hereto in the Appendix. The related prior appeal, *Krain v. Smallwood, et al.*, is published at *Krain v. Smallwood et al.*, 880 F.2d 1119 (9th Cir. 1989).

JURISDICTION

On April 18, 1991, the 9th Circuit Court of Appeals affirmed consolidated appellate cases, Docket Nos. 90-55033, 55259, 55265, 55827, and 55977. This Court has jurisdiction under the 5th and 14th Amendments to the U.S. Constitution to review the decisions of the 9th Circuit under U.S. Supreme Court rules of procedure and U.S. Supreme Court Rule 12.2.

PERTINENT CONSTITUTIONAL PROVISIONS

Amendment XIV (equal protection clause)

Amendment XIV, Section 1:

> . . . no state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Amendment V (due process clause)

STATEMENT OF THE CASE

1. Nature Of The Case

In June 1987, petitioner filed a complaint in the United States District Court for the Central District of California, *Krain v. Smallwood, et al.*, CV 87-5387-JGD, which sought money damages, violation of his federal civil rights as a born Jew, libel and slander, invasion of privacy, intentional infliction of emotional distress, and other claims. A previous federal civil rights claim for 42 USC 1981, 1983, 1985, 1986 et al. violations was filed against Brent Sundin, et al. in June 1986 (CV 86-4289-LEW) with the additional allegation of battery and negligent retention. In January 1988, an additional civil rights and defamation action was filed against Jerry Hicks, et al. (CV 88-0244) and in August 1989, an additional complaint was filed against Ted Millard, et al. (CV 89-2512-WPG) alleging identical violations against additional defendants. All cases were assigned to judges as follows: Hicks, et al. to Consuelo Marshall; Millard, et al. to Judge William Gray;

Smallwood, et al. to Judge Davies; Sundin, et al. to Judge Laughlin Waters, who dismissed as follows:

Case	Date of Dismissal	Reason To Contest Dismissal
Hicks, et al.	May 1989	Conclusion of judge as to incompetent appellant, although no current competency report was obtained.
Millard, et al.	November 1989	No proof of service, although: a) Proof of service were on file; b) Defendants had made voluntary appearances; c) Federal Rules of Civil Procedure 4(g); d) No documented prejudice; e) There was documented evasion of service; f) Could not dismiss with prejudice if appellant was incompetent.
Smallwood, et al.	June 1989	Conclusion of judge as to incompetent appellant, although no current competency report was obtained.
Sundin, et al.	June 1989	Conclusion of judge as to incompetent appellant, although no current competency report was obtained.

The 9th Circuit Court of Appeals consolidated these four cases for ruling made April 18, 1991. This Petition is made within the 60 day time limit.

2. Allegations

Petitioner Krain was a prominent Jewish dermatologist in the Counties of Orange and Los Angeles and a distinguished author of medical publications, ethical member of medical and dermatology associations who was falsely arrested in 1981 for Medi-Cal and bribery allegations which were dismissed. However, in the process, Krain was beaten up by Medi-Cal investigators now dismissed from state service (*Krain v. Sundin, et al.*) and was harassed and had his medical practice destroyed by the outlandish tactics of the Jew-hating defendants in *Krain v. Sundin, et al.* who made anti-semitic diatribes to Krain's patients merely because of his physiognomy as a born Jew. They planted false newspaper stories attacking Krain before trial as a Jew in Orange County, and this led to the defamation and civil rights allegations in *Krain v. Hicks, et al.* Krain was illegally transferred from Brea Hospital in California to the twin hospital in Virginia and back, which in fact was an illegal federal investigation of Krain without Krain's consent and because he was a thorn in the side of right-wing types in Orange County, California. This led to the allegations in *Krain v. Millard, et al.* The first *Krain v. Smallwood et al.* case was remanded in the meantime by the 9th Circuit to the district court which ignored Krain's requests for a current competency determination as the decision required, and instead dismissed *Smallwood* and *Sundin* without prejudice, requiring a pro se litigant to refile these cases by whim of court and without any current opinion from a qualified mental health professional. Petitioner Krain is requesting review of the questions presented.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD REMAND TO THE 9TH CIRCUIT TO DETERMINE THAT PROOFS OF SERVICE WERE ON FILE FOR THE DISMISSED LITIGANTS OR A VOLUNTARY APPEARANCE WAS MADE AND CERTIFIED MAIL OR FEDERAL EXPRESS RECEIPTS WERE SUFFICIENT AND AN EVIDENTIARY HEARING SHOULD HAVE BEEN REQUIRED FOR DELIBERATE EVASION FOR SERVICE WAS SHOWN.

Factual and legal errors were made in the decision in Docket No. 90-55265, *Krain v. Millard, et al.* as dismissal for lack of proof of service was improper where:

1. Defendants had made voluntary appearances, *Murphy v. Travelers Insurance Company*, 534 F.2d 1155 (1976).

2. Federal Rules of Civil Procedure 4(g) provides that failure to make proof of service does not affect the validity of service and documentation of actual service was provided in appellant's briefs.

3. Certified mail service was sufficient, *United States v. Ayer*, 857 F.2d 881 (1988).

4. There was documented to be deliberate evasion of service where *Ruiz Varela v. Sanchez Veloz*, 814 F.2d 825 (1987) is controlling.

5. There was no documentation of prejudice to appellees; see *Pocahontas First Corporation v. Ventura Planning Group, Inc.*, 572 F.Supp. 503 (1983).

6. Proofs of service were filed in the lower court timely at Docket No. 52, but ignored by the lower court and the 9th Circuit.

Judicial notice is respectfully requested of these items under Federal Rules of Evidence 201.

II.

THIS COURT SHOULD RULE AS THE SECOND CIRCUIT, NOT THE NINTH CIRCUIT, DID THAT WHERE THERE IS EVASION OF SERVICE AND RETURN OF THE MAIL RECEIPT (UNACKNOWLEDGED) THAT THIS DOES NOT VOID SERVICE BY MAIL ACKNOWLEDGEMENT.

The 9th Circuit in *Worrell v. B.F. Goodrich Company*, 845 F.2d 840 (9th Cir. 1988) and the 8th Circuit in *Gulley v. Mayo Foundation*, 886 F.2d 161, 165 (8th Cir. 1989) have ruled that no mail service is accomplished where the mail receipt is not returned, but the 2nd Circuit in *Morse v. Elmire Country Club*, 752 F.2d 35, 39 had said a certified receipt without return acknowledgement is acceptable mail service, especially where there is evasion of service. *Ruiz Varela v. Sanchez Veloz, supra* and *Morse v. Elmire Country Club, supra* state that received but unacknowledged mail service is acceptable. The 1st Circuit in *United States v. Ayer, supra* says certified mail service is acceptable.

This Court is asked to clarify and secure uniformity of these five differing federal circuit mail service requirements for all federal litigants and also to indicate approval or disapproval in this modern age of Federal Express, UPS, or private carrier receipts as opposed to certified mail with its illegibility as opposed to the legibility of printed Federal Express receipts.

III.

THIS COURT SHOULD RESOLVE CONFLICTING FEDERAL CIRCUIT DECISIONS AND RULE THAT A LOWER COURT JUDGE'S DOUBT ABOUT COMPETENCE DOES NOT JUSTIFY DISMISSAL WITH OR WITHOUT PREJUDICE UNTIL SUCH TIME AS A QUALIFIED MENTAL HEALTH PROFESSIONAL CAN RENDER AN OPINION AS TO THE CURRENT NOT PAST COMPETENCY OF A LITIGANT.

Petitioner is an Illinois resident but sought relief in California federal courts. Both California Welfare and Institutions Code 5331 and Illinois Health and Welfare Code Chapter 8 *et seq.* state clearly that past incompetency determinations should have no bearing on present mental competence. In *Krain v. Hicks, et al., Smallwood, et al.*, and *Sundin, et al.*, both the lower court and the appellate court erred in dismissing Krain's cases because neither the lower court nor the appellate court can properly dismiss Krain's cases without prejudice on the basis of a doubt about Krain's competency where:

1. Krain was never given a competency hearing by a qualified mental health professional of recent date, but by a judge and magistrate without any mental health training, no medical degree, and no medical license as required by each and every case cited in the *Krain v. Smallwood, et al.* published decision.

2. Where at the same time the very same judges, Davies, Waters, and Gray, were making rulings in the 13 cases coordinated and consolidated before them, including these four (see *Krain v. Millard, et al.* docket sheet, docket item No. 40) as if Krain were competent. See, for example, orders in *Krain v. Kahn*, CV 90-305-LEW and *Krain v. Smith*, CV 88-5800-LEW and *Krain v. Ponath*, CV 89-1176-LEW.

> At least 13 other orders were issued in these cases as coordinated and consolidated by these judges.

Krain cannot be incompetent in four cases and competent in nine others during the same time frame and same coordinated/consolidated proceeding.

The appellate court has clearly failed to take notice of the related law in the nine other cases and has committed reversible error and should be ordered to void its previous decision and order a qualified mental health professional to examine Krain. Petitioner is a licensed physician in Illinois and ten other states who has current normal psychiatric evaluations. To attempt to dismiss these cases without a current competency determination is judicial error and a violation of Krain's 5th and 14th Amendment rights under the U.S. Constitution to due process and equal protection under the law. Krain's declarations at the lower and appellate court levels evidenced cooperation. Judicial notice of the above is requested under Federal Rules of Evidence 201.

This Court is requested to clarify its earlier decision in *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) which interprets Federal Rules of Civil Procedure 17(c) and 35(a) as to whether:

1. Good cause is required before such exam and what is good cause;

2. Whether the 9th Circuit decision in *Krain v. Smallwood, supra* established good cause and was in fact illegal since Petitioner had no current competency exam but was cooperative, but the Court never ordered one before dismissal despite Krain's cooperation.

The 9th Circuit differs from those of the 4th and 5th Circuits, *Cyntje v. Government of Virgin Islands*, 95 FRD

430 (DVI 1982 4th Cir.) and *Roberts v. Ohio Casualty Insurance Company*, 256 F.2d 35, 39 (5th Cir. 1958) which require a mental exam by a qualified mental health professional or appointment of an attorney. *Westcott v. United States Fidelity and Guaranty Company*, 158 F.2d 20, 22 (4th Cir. 1946).

Krain is being short circuited by a circuit Court of Appeals that blithely ignores Federal Rules of Civil Procedure 17(c) and 35(a). This Court is respectfully requested to interpret Krain's rights and establish uniformity for the conflicting circuit court interpretations.

CONCLUSION

Wherefore, Petitioner respectfully prays that this Honorable Court grant this Petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the 9th Circuit.

Respectfully submitted,

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APPENDIX

[FILED APRIL 18, 1991]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE S. KRAIN, M.D.,	)	
	)	Nos. 90-55033/55259
Plaintiff-Appellant,	)	
	)	D.C. # CV-88-0244-CBM
v.	)	
	)	
JERRY HICKS; TIMES MIRROR CORPORATION; TOM JOHNSON; COUNTY OF ORANGE; et al.,	)	
	)	
Defendants-Appellees.	)	

LAWRENCE S. KRAIN, M.D.,	)	
	)	No. 90-55265
Plaintiff-Appellant,	)	
	)	D.C. # CV-89-2512-WPG
v.	)	
	)	
TED MILLARD; TOM JOHNSON; ALFRED GOODWIN, Hon.; RONALD REAGAN; EDWARD WALLIN; RODERICK PONATH, et al.,	)	
	)	
Defendants-Appellees.	)	

LAWRENCE S. KRAIN, M.D., Plaintiff-Appellant, v. DONALD SMALLWOOD; LYNN WATERS; KATHLEEN O'LEARY; LUPE TORRES; MAURICE EVANS; CAROLYN ALBERTY; JOHN TROTTER; COUNTY OF ORANGE; KITTY LOVE; MARY LITTRELL; PAUL MAST, Esq.; ORANGE COUNTY MEDICAL ASSOCIATION; MARK WRAY, Defendants-Appellees.	No. 90-55827 D.C. # CV-87-5387-JGD ORDER

LAWRENCE S. KRAIN, Plaintiff-Appellant, v. BRENT SUNDIN; JAMES ALFANO; RICHARD BEACOM; ROBERT FITZGERALD; GERALD O'DONNELL; TIM MILLER; BRAD GATES, et al., Defendants-Appellees.	No. 90-55977 D.C. # CV-86-4289-LEW

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING,* District Judge.

These matters are consolidated for purposes of disposition.

---

* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

[FILED APRIL 18, 1991]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE S. KRAIN, M.D.,	)	
	)	Nos. 90-55033/55259
Plaintiff-Appellant,	)	
	)	D.C. # CV-88-0244-CBM
v.	)	
	)	
JERRY HICKS; TIMES MIRROR CORPORATION; TOM JOHNSON; COUNTY OF ORANGE; et al.,	)	
	)	
Defendants-Appellees.	)	

LAWRENCE S. KRAIN,	)	
	)	No. 90-55265
Plaintiff-Appellant,	)	
	)	D.C. # CV-89-2512-WPG
v.	)	
	)	
TED MILLARD; TOM JOHNSON; ALFRED GOODWIN, Hon.; RONALD REAGAN; EDWARD WALLIN; RODERICK PONATH, et al.,	)	
	)	
Defendants-Appellees.	)	

LAWRENCE S. KRAIN, M.D., Plaintiff-Appellant, v. DONALD SMALLWOOD; LYNN WATERS; KATHLEEN O'LEARY; LUPE TORRES; MAURICE EVANS; CAROLYN ALBERTY; JOHN TROTTER; COUNTY OF ORANGE; KITTY LOVE; MARY LITTRELL; PAUL MAST, Esq.; ORANGE COUNTY MEDICAL ASSOCIATION; MARK WRAY, Defendants-Appellees.	Nos. 90-55827 D.C. # CV-87-5387-JGD MEMORANDUM*

LAWRENCE S. KRAIN, M.D., Plaintiff-Appellant, v. BRENT SUNDIN; JAMES ALFANO; RICHARD BEACOM; ROBERT FITZGERALD; GERALD O'DONNELL; TIM MILLER; BRAD GATES, et al., Defendants-Appellees.	No. 90-55977 D.C. # CV-86-4289-LEW

* This deposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding
William P. Gray, District Judge, Presiding
John G. Davies, District Judge, Presiding
Laughlin E. Waters, District Judge, Presiding
Submitted April 2, 1991**
Pasadena, California

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING,*** District Judge.

The judgments and orders of the district courts in the referenced cases are AFFIRMED.

In No. 90-55265, the dismissals were entered only as to named defendants as to whom there had been no proof of service notwithstanding plaintiff's having been given ample notice and time to provide it.

In No. 90-55827, the district court dismissed the complaint and the action without prejudice. In a prior appeal, we held this would be an appropriate resolution of this case. *Krain v. Smallwood,* 880 F.2d 1119 (9th Cir. 1989). The district court's action was taken only after ample notice to Krain and his having failed to comply with the orders of the court.

In No. 90-55977, the issues are the same as in No. 90-55827 except that the defendant-appellee is Brent Sundin instead of Smallwood.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

*** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

In Nos. 90-55033 and 90-55259, Krain appeals the dismissal of his action for failure to comply with the district court's order for a competency hearing and also appeals the competency order. The dismissal, which was without prejudice, and the competency order were proper. *Krain v. Smallwood, supra.*

AFFIRMED.

Supreme Court, U.S.
FILED
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IN THE

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OCTOBER TERM, 1990

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JERRY HICKS, TIMES MIRROR CORPORATION, TOM JOHNSON, COUNTY OF ORANGE, et al.; and TED MILLARD, TOM JOHNSON, ALFRED GOODWIN, RONALD REAGAN, EDWARD WALLIN, RODERICK PONATH, et al.; and DONALD SMALLWOOD, LYNN WATERS, KATHLEEN O'LEARY, LUPE TORRES, MAURICE EVANS, CAROLYN ALBERTY, JOHN TROTTER, COUNTY OF ORANGE, KITTY LOVE, MARY LITTRELL, PAUL MAST, ORANGE COUNTY MEDICAL ASSOCIATION, MARK WRAY; and BRENT SUNDIN, JAMES ALFANO, RICHARD BEACOM, ROBERT FITZGERALD, GERALD O'DONNELL, TIM MILLER, BRAD GATES, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit U.S. Supreme Court (Rules 14 and 33)

SUPPLEMENTAL APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAWRENCE S. KRAIN, M.D.,

Petitioner,

v.

JERRY HICKS, TIMES MIRROR CORPORATION, TOM JOHNSON, COUNTY OF ORANGE, et al.; and TED MILLARD, TOM JOHNSON, ALFRED GOODWIN, RONALD REAGAN, EDWARD WALLIN, RODERICK PONATH, et al.; and DONALD SMALLWOOD, LYNN WATERS, KATHLEEN O'LEARY, LUPE TORRES, MAURICE EVANS, CAROLYN ALBERTY, JOHN TROTTER, COUNTY OF ORANGE, KITTY LOVE, MARY LITTRELL, PAUL MAST, ORANGE COUNTY MEDICAL ASSOCIATION, MARK WRAY; and BRENT SUNDIN, JAMES ALFANO, RICHARD BEACOM, ROBERT FITZGERALD, GERALD O'DONNELL, TIM MILLER, BRAD GATES, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit U.S. Supreme Court (Rules 14 and 33)

SUPPLEMENTAL APPENDIX

[FILED JANUARY 3, 1990]

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D.	) Case No.
	) CV 88-244
Plaintiff,	) CBM(RWR)
	)
vs.	) JUDGMENT
	)
JERRY HICKS; TIMES MIRROR CORPORATION; TOM JOHNSON, Publisher, Times Mirror Corporation	)
Defendants.	)

IT IS ADJUDGED that the action is dismissed.

Dated: 12/29/89

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE

[LODGED OCTOBER 17, 1988]
[FILED NOVEMBER 30, 1988]

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D.,	) CASE NO.
	) CV88-244-CBM
Plaintiff,	) (RWR)
	)
v.	) JUDGMENT
	)
JERRY HICKS; TIMES MIRROR CORPORATION; TOM JOHNSON, Publisher, Times Mirror Corporation; COUNTY OF ORANGE; GIBSON, DUNN & CRUTCHER, a partnership of law corporations; WALLACE WADE; JOHN GIER; NANCY RICHMAN; REX HEINKE, and RAGNHILD REIF, as individuals; WILLIAM FRENCH SMITH, as an individual; HERMAN ROMM, M.D. and CECIL HICKS, as individuals,	)
	)
Defendants.	)

Pursuant to the Order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate,

IT IS ADJUDGED that all federal question claims for relief contained in the First Amended Complaint are dismissed without further leave to amend.

Dated: 11/7/88

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE

[LODGED OCTOBER 27, 1988]
[FILED NOVEMBER 30, 1988]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D., Plaintiff,	CASE NO. CV88-244-CBM (RWR)
v.	ORDER ADOPTING PARTIAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE RECOMMENDING DISMISSAL OF ALL FEDERAL QUESTION CLAIMS WITHOUT FURTHER LEAVE TO AMEND
JERRY HICKS; TIMES MIRROR CORPORATION; TOM JOHNSON, Publisher, Times Mirror Corporation; COUNTY OF ORANGE; GIBSON, DUNN & CRUTCHER, a partnership of law corporations; WALLACE WADE; JOHN GIER; NANCY RICHMAN; REX HEINKE, and RAGNHILD REIF, as individuals; WILLIAM FRENCH SMITH, as an individual; HERMAN ROMM, M.D. and CECIL HICKS, as individuals, Defendants.	

Pursuant to 28 U.S.C. Section 636(b)(1)(B), the Court has reviewed the complaint, all of the records and files herein and the attached Partial Reports and Recommendations of the United States Magistrate. Objections to the Magistrate's Partial Report and Recommendation have been filed herein. Having made a *de novo* determination of those portions of the Partial Report and Recommendation to which objection has been made, the Court con-

curs with and adopts the findings and conclusions of the Magistrate.

IT IS ORDERED that a Judgment be issued (1) approving and adopting these Partial Reports and Recommendations as the findings of fact and conclusions of law herein and (2) directing that Judgment be entered dismissing, without further leave to amend, all federal claims contained in the First Amended Complaint as to all Defendants.

IT IS FURTHER ORDERED that the Clerk shall serve forthwith a copy of this Order and the Judgment of this date on the Plaintiff and counsel for the Defendants.

Dated: 11/7/88

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE

[FILED OCTOBER 27, 1988]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D., Plaintiff,	CASE NO. CV88-244-CBM (RWR)
v.	FINAL PARTIAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON A CIVIL RIGHTS COMPLAINT RECOMMENDING DISMISSAL OF ALL FEDERAL QUESTION CLAIMS WITHOUT FURTHER LEAVE TO AMEND
JERRY HICKS, TIMES MIRROR CORPORATION; TOM JOHNSON, Publisher, Times Mirror Corporation; COUNTY OF ORANGE; GIBSON, DUNN & CRUTCHER, a partnership of law corporations; WALLACE WADE; JOHN GIER; NANCY RICHMAN; REX HEINKE, and RAGNHILD REIF, as individuals; WILLIAM FRENCH SMITH, as an individual; HERMAN ROMM, M.D. and CECIL HICKS, as individuals, Defendants.	

This Final Partial Report and Recommendation and the attached Partial Report and Recommendation are submitted pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and General order 194 of the United States District Court for the Central District of California.

On October 17, 1988, the Clerk filed the Notice of Filing of Magistrate's Partial Report and Recommendation and the Lodging of Proposed Judgment, which was served on the parties together with copies of said Partial Report and Recommendation.

Plaintiff has timely filed his objections to the Partial Report and Recommendation. The Magistrate has carefully read and considered the objections, but he is not persuaded to modify his recommendation in any respect. The objections set forth by Plaintiff, in a rambling and virtually unintelligible concoction of headnote references, are twice as long in text as the original Partial Report and Recommendation. The rationale set forth in the objections, if it can be discernable at all, seems to suggest that the rules of pleading should be relaxed for Plaintiff, since he is *pro se* and "not learned in the law." While any generous reading of his objections certainly proves his latter point, he fails to comprehend the thrust of the Partial Report and Recommendation, setting forth the specific reasons why his federal question claims should be dismissed without further leave to amend. He clearly fails to recognize the widespread authority set forth in the Partial Report and Recommendation which indicates dismissal is appropriate where it is obvious Plaintiff can prove no set of facts entitling him to relief.

Plaintiff also suggests a stay of all proceedings, as an alternative to dismissal, since his appeal of this Court's denial of his motion to disqualify the Magistrate is still pending. From prior experience, Plaintiff should know any such appeal of a collateral order is improper and should await final judgment. *United States v. Washington*, 573 F.2d 1121 (9th Cir. 1978).

Plaintiff's objections are rambling, often incoherent and fail to argue any new areas which have not been fully explored *ad nauseam* in this and prior related cases. It is, therefore, time to remove this Court as an alternative therapy playground for Plaintiff's attacks on his perceived scores of personal enemies. Plaintiff's objections, as well as the federal questions contained in his First Amended Complaint, are wholly frivolous and without merit.

IT IS THEREFORE THE FINAL PARTIAL RECOMMENDATION OF THE MAGISTRATE that an Order be issued by the Court (1) approving and adopting these Partial Reports and Recommendations as the findings of fact and conclusions of law herein, and (2) directing that all federal question claims set forth in the First, Second and Fifth Causes of Action of his First Amended Complaint be dismissed without further leave to amend.

Dated: October 27, 1988

/s/ Ronald W. Rose
RONALD W. ROSE
UNITED STATES
MAGISTRATE

[FILED OCTOBER 17, 1988]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D., Plaintiff,	CASE NO. CV88-244-CBM (RWR)
v.	PARTIAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON A CIVIL RIGHTS COMPLAINT RECOMMENDING DISMISSAL OF ALL FEDERAL QUESTION CLAIMS WITHOUT FURTHER LEAVE TO AMEND
JERRY HICKS, TIMES MIRROR CORPORATION; TOM JOHNSON, Publisher, Times Mirror Corporation; COUNTY OF ORANGE; GIBSON, DUNN & CRUTCHER, a partnership of law corporations; WALLACE WADE; JOHN GIER; NANCY RICHMAN; REX HEINKE, and RAGNHILD REIF, as individuals; WILLIAM FRENCH SMITH, as an individual; HERMAN ROMM, M.D. and CECIL HICKS, as individuals, Defendants.	

This Partial Report and Recommendation is submitted pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California, and adds yet more pages to the already voluminous records of litigious activity of Lawrence Krain, Plaintiff, who during the past two years, has commenced approximately 14 *pro se* cases in this District.

In each of his cases Plaintiff, a dermatologist, seeks millions of dollars in punitive and compensatory damages

against all of the Defendants for allegedly engaging in racial discrimination, using the state civil and criminal court systems for the purpose of denying him a fair trial on certain civil and criminal matters, and for allegedly defaming him due to his perceived mental disorders. Virtually all of his claims arise from an alleged multitude of closely intertwined conspiracies in which he believes (at last count), over 150 defendants have participated for the express purpose of denigrating his name and reputation in the medical community, to steal his medical practice, and to deprive him of equal protection of the laws due to racial and religious discrimination because he is a "born Jew and Democrat."

Each of Plaintiff's civil cases, as does this one, arise from a common core of operative facts involving state criminal prosecutions brought against him, originally for Medi-Cal fraud, and later for conspiracies to have a witness murdered and to suborn perjury. For the most part, his claims, if cognizable at all, appear to be for malicious prosecution which are disguised as civil rights actions. Recently, two of the state criminal actions ended with Krain entering knowing and voluntary guilty pleas for which he has been sentenced to one year of confinement in the Brea Neuropsychiatric Hospital in Brea, California.

PROCEDURAL BACKGROUND

The instant action was commenced on January 15, 1988 when Plaintiff filed his 23 page complaint against 11 defendants. These Defendants represent a local newspaper, various of its employees, attorneys for the newspaper which have represented the paper in various other state actions, as well as the County of Orange, one of its prosecutors and an investigator. Plaintiff alleges these Defendants

acted as private individuals through a continuing conspiracy to deny him a shopping list of federally protected civil rights. Plaintiff further attempts to allege a number of state claims based on diversity of citizenship and seeks injunctive relief.

On September 22, 1988, this Court dismissed Plaintiff's complaint for the well-reasoned arguments set forth in the Defendant's Motion to Dismiss. In the interests of justice, Plaintiff was allowed ten days leave to amend his complaint. The Order specifically advised Plaintiff to "cure the defects of the original complaint. . ." Plaintiff was also specifically advised at that time that failure to fully comply with the Order could result in an involuntary dismissal for lack of prosecution. Plaintiff was specifically cautioned to address the allegations in the Defendants' Motion to Dismiss that his original complaint was conclusory in nature and he was, therefore, advised to make his First Amended Complaint more factually specific.

On October 3, 1988, Plaintiff filed a new 29 page First Amended Complaint which the Court has carefully reviewed. This review indicates that Plaintiff has not made any meaningful attempt to comply with the September 22, 1988 Order. Instead, Plaintiff has used this opportunity to add three new Defendants, being a former Attorney General of the United States, a medical doctor and the District Attorney for the County of Orange. Plaintiff's response to the Order dismissing his original complaint with leave to amend was merely to add approximately seven paragraphs to the First Amended Complaint, which essentially described the new Defendants and to add more conclusory and irrelevant information as to the perceived activities of these Defendants.

Notwithstanding the three new Defendants and the additional material set forth describing these Defendants,

this so-called amended complaint is virtually identical in form and substance to the original complaint. In fact, a careful review indicates that the amended complaint, obviously retrieved from a word processing disc, even carries forward the spelling and grammatical errors of the original complaint. This First Amended Complaint, like so many others Plaintiff has filed in this District, appear as identical, except for various Defendants whose names change from complaint to complaint. Plaintiff's conclusory, rambling diatribe of vindictive, contradictory or completely nonsensical allegations, are all precisely of the same quality and quantity as his prior complaint and other complaints in related actions which are pending before this Court. As it has previously been the case with Plaintiff's pleadings, they are without substance in law or fact. The allegations contained in this new complaint, as before, appear wholly frivolous.

For example, Plaintiff's attempt to prove facts in support of his complaint result in irrelevant allegations such as those against Defendant Wallace Wade where Plaintiff claims this Defendant's driving of "a new Mercedes Benz on a prosecutor's salary and [who] lives in San Clemente, California, a notorious anti-Semitic region of Orange County, California which has restrictive covenants in selling property to Jews, . . ." (First Amended Complaint, Paragraph 5) as well as the allegations against a District Attorneys' investigator, Defendant John Gier, who "drives a new Cadillac on an investigator's salary due in part to illegal income from extortion." (First Amended Complaint, Paragraph 5). New Defendant, former Attorney General William French Smith, after various identifying descriptive material, is alleged to have conspired with Orange County District Attorney Cecil Hicks and a doctor Herman Romm, to "falsely and fraudulently induce Plaintiff Krain to plead guilty to a state crime of

suborning perjury to get Krain into Brea Hospital in Brea, California, so Dr. Romm could discredit Plaintiff and frame him for crimes because Plaintiff's suits might hurt the Orange County Medical Association and Orange County defendants in other of Krain's federal civil actions, financially and otherwise." As before, absolutely no facts whatsoever are given for these serious and unsubstantiated allegations. (First Amended Complaint, Paragraph 9). Orange County District Attorney, Defendant Cecil Hicks, is also accused, in Paragraph 10 of the First Amended Complaint, with various unsupported conspiracies to "frame" this Plaintiff for "unspecified crimes yet to be charged. . .", which conspiracy existed with Dr. Romm, who "has framed five other people for murder according to an article stuffed into Plaintiff Krain's belongings. . ." (First Amended Complaint, Paragraph 10). Krain alleges that this was done for "political reasons and to cover up anti-Semitic hatred in Orange County, California, for business reasons because Disneyland's revenue was down ten percent in the last year because of anti-Semitic neo-Nazi terrorist skinhead gangs. . ." (First Amended Complaint, Paragraph 10).

Plaintiff also complains of vandalism at his Jewish Temple in Fullerton, California, and other synagogues in Orange County, California. He attributes this vandalism to a conspiracy with the co-Defendants in the present case, yet there are absolutely no facts to support this.

A thorough reading of Plaintiff's complaint reveals that he is nothing more than a disgruntled state court litigant who, upon being dissatisfied with the outcome of his civil and criminal cases in the state system, has merely carried his voluminous and incoherent claims to the steps of the federal court. Indeed, in Paragraph 21 of his First Amended Complaint, Plaintiff advises that he has been

held to be a vexatious litigant no less than seven times in the Superior Courts for Orange and Los Angeles Counties. Based upon the nature of much of the language contained in his pleadings, his litigious history, and the common threads that bind his cases together, it has become increasingly clear that this complaint and Plaintiff's underlying purpose to this litigation is purely vexatious. In all of his cases, Plaintiff has been afforded ample opportunities to amend his complaints so as to comply with the applicable law. He has essentially refused to do so. Instead, it appears he is using his complaints as a method of therapy to vent his anger at those he perceives responsible for his present predicament. Indeed, virtually everyone who comes in touch with this Plaintiff ends up as a Defendant. Reviewing his prior complaints, it is apparent that he has sued virtually every former attorney, judge, public employee, etc. who has had any contact whatsoever with his perceived downfall. Most recently, Plaintiff has elected to do this from his suite at the Brea Neuropsychiatric Hospital. This latest episode occurred following his knowing and voluntary entry of guilty pleas to various criminal charges that were pending against him in the state court in which gave rise to these cases in the first place. It is impossible to discern any viable claim for relief whatsoever, since by pleading guilty to the state criminal charges, Krain is apparently conceding that these Defendants caused him no harm.

DISCUSSION

Like Plaintiff's original complaint, his First Amended Complaint is virtually duplicative of the original. The only exceptions, as noted above, are new descriptive material for the newly named Defendants, and various irrelevant phraseology put forth at certain points in the complaint to modify or expand on prior conclusory allegations.

The general tone and thrust of Plaintiff's entire exercise is his perception that the conspiracy against him continues to grow, that the Defendants are wrong, and that his conclusion is the only conclusion which this Court can reach.

INSUFFICIENCY OF PLEADINGS

In reviewing Plaintiff's First Amended Complaint, the Court's inquiry is directed to whether the allegations state a sufficient claim under Fed.R.Civ.P. 8(a). *Wright & Miller*, Federal Practice and Procedure, Section 1357, p. 594 (1969).

Rule 8(a) sets forth the requirements for pleading a claim and calls for a "short and plain statement of the claim showing that the pleader is entitled relief."

The controlling standard for determining the sufficiency of a complaint was first enunciated in *Conley v. Gibson*, 355 U.S. 41, 45-446, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) in which the Supreme Court stated that an action may be dismissed for failure to state a claim if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

When the plaintiff proceeds *pro se*, however, his allegations are viewed under a less stringent standard. *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The Court is mindful of the fact that *pro se* pleadings are to be liberally construed, *Haines v. Kerner*, *supra*, and that all pleadings should be construed so as to do "substantial justice," Fed.R.Civ.P. 8(f), *Conley v. Gibson*, *supra*. Although courts apply a more liberal standard when the plaintiff is *pro se*, the complaint must still contain "a short and plain statement of the claim show-

ing that the pleader is entitled relief." Rule 8(a)(2); *Jones, supra* at 649 (citing *Williams v. Gorton*, 529 F.2d 668, 670 (9th Cir. 1976)).

> Conclusionary allegations, unsupported by facts, have consistently been rejected as insufficient to state a claim under the Civil Rights Act . . . "It [is] incumbent upon [plaintiff] to allege with at least some degree of particularity overt acts which defendants engaged in" which support plaintiff's claim. (Cites omitted.) *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977).

Even a *pro se* complaint is subject to dismissal if the pleading fails reasonably to inform the adverse party of the asserted cause of action. *Brown v. Califano*, 75 F.R.D. 497, 499 (D.D.C. 1977) and cases cited therein; see also *In re "Santa Barbara Like it is Today" Copyright Infringement Litigation*, 94 F.R.D. 105, 108 (D. Nevada 1982). Accordingly, *pro se* complaints have been dismissed under Rule 8(a) where they were found to be "a labyrinthian prolixity of unrelated and vituperative charges that defied comprehension," *Prezzi v. Schleter*, 469 F.2d 691 (2d Cir. 1972), *cert. denied*, 422 U.S. 935 (1972); "confusing, ambiguous, redundant, vague and, in some respects, unintelligible," *Wallach v. City of Pagedale*, 359 F.2d 57 (8th Cir. 1966); and "so verbose, confused and redundant that its true substance, if any, is well disguised." *Lowery v. Hauk*, 422 F.Supp. 490, 491-92 (C.D. Cal. 1976) (quoting *Corcohan v. Yorty*, 347 F.2d 222 (9th Cir.), *cert. denied* 382 U.S. 966 (1965)). A *pro se* petitioner is ordinarily given the opportunity to amend his defective pleadings to comply with Rule 8(a), but dismissal with prejudice is not inappropriate "where . . . the petitioner has shown that he is no stranger to the courts." *Cf. Brown v. Califano*, 75 F.R.D. 497, 499 (D.D.C. 1977) (citing *Hutter v. Schraml*, 51 F.R.D. 519, 522 (E.D. Wisconsin 1970)); *In re "Santa Barbara Like*

it is Today" Copyright Infringement Litigation, supra at 108-110.

"While a *pro se* petitioner is given additional leeway in his pleadings there must be some limit to the indulgence of the law and the resultant imposition on a respondent in these suits," *United States ex rel. Dattola v. National Treasury Employees*, 86 F.R.D. 496, 499 (1980). "Ignorance of court rules does not constitute excusable neglect, even if the litigant appears *pro se*. See *Kendall v. Hoover Co.*, 751 F.2d 171, 175 (6th Cir. 1984) (failure to respond to summary judgment motion is inexcusable neglect); *Carter v. CIR*, 784 F.2d 1006, 1008 (9th Cir. 1986) (*pro se* litigant must abide by rules of court)." *Swimmer v. IRS*, 811 F.2d 1343, 1345 (9th Cir. 1987). It is not the "court's duty to advise [a *pro se* litigant] of the measures he should take" to represent himself. "To give that advise would entail the court's becoming a player in the adversary process rather than remaining its referee" and "invites an undesirable open-ended participation by the court." *Jacobsen v. Filler*, 790 F.2d 1362, 1364-66 (9th Cir. 1986).

Plaintiff also attempts, in his present First Amended Complaint, to challenge the fairness and outcome of his criminal proceedings before the Orange County Superior Court. Although Plaintiff asks for monetary damages and an injunction, and styles his complaint as one for civil rights, he is in fact challenging his confinement. In that event habeas corpus, rather than Section 1983 relief, is the appropriate remedy. *Preisser v. Rodriguez*, 411 U.S. 475, 486-90, 93 S.Ct. 1827, 36 L.Ed. 439 (1973). The Civil Rights Act does not provide a remedy for every wrongful or improper deprivation of liberty, nor can it be used to duplicate or circumvent federal habeas corpus merely by framing a pleading in the form of a complaint seeking

injunctive and monetary relief when the complaint is based on the illegality of his confinement. *Gardner v. McCarthy*, 503 F.2d 733, 734 (9th Cir. 1974).

Construed as a petition for habeas corpus, Plaintiff's complaint is defective for failure to allege exhaustion of state remedies as required by 28 U.S.C. Section 2254(b) and must be dismissed. A federal court must dismiss the habeas petition of a state prisoner his claims have not been exhausted in the state courts. *Rose v. Lundy*, 455 U.S. 509, 510, 102 S.Ct. 1198, 78 L.Ed.2d 379 (1982). State remedies have not been exhausted unless all claims have been fairly presented to the states courts and the *highest* state court has disposed of the claims on the merits. *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979).

Plaintiff's allegations under 42 U.S.C. Section 1985 also requires "at least minimum factual support of the existence of a conspiracy." *Robinson v. McCorkle*, 462 F.2d 111, 113 (3d Cir.) *cert. denied*, 409 U.S. 1042 (1972); *Sparkman v. McFarlin*, 601 F.2d 261 (7th Cir. 1979) (findings facts insufficient for conspiracy). Plaintiff must allege with "some degree of particularity" overt acts in which defendants engaged. *Franklin v. Oregon*, 662 F.2d 1337 (9th Cir. 1981). See also *McGillicuddy v. Clements*, 746 F.2d 76 (1st Cir. 1984) (requiring plaintiff to plead conspiracy in some detail).

As has been noted many times before, Plaintiff is hardly a stranger to this Court. In this case, as well as all of the others, he has been afforded a multitude of opportunities to file amended complaints and made well-aware of the underlying deficiencies of his pleadings. Plaintiff has been given numerous lectures and case authority to review, so as to determine the requirements of Rule 8. Nonetheless, Plaintiff stubbornly persists in refiling the same defective boilerplated complaints over and over again in case after case, needlessly consuming page after page of docket in

this District. For these reasons, among others set forth herein, Plaintiff has failed to state any federal claims for relief.

CONCLUSION

Based upon the foregoing analysis, it appears to a certainty that the fatal deficiencies of Plaintiff's First Amended Complaint cannot be cured by amendment. The nature of Plaintiff's claims, the history of his litigious escapades in this Court and the state courts where he has been determined on numerous occasions as a vexatious litigant, as well as his apparent lack of willingness to actually start over in drafting his complaint so as to correct deficiencies articulated by this Court in its Orders, leads only to one inevitable conclusion; Plaintiff's federal questions claims for relief should be dismissed in their entirety.

IT IS THEREFORE RECOMMENDED that the Court issue an Order (1) approving and adopting this Partial Report and Recommendation as the findings of fact and conclusions of law herein, and (2) directing that all federal questions claims set forth in the First, Second and Fifth Causes of Action of his First Amended Complaint be dismissed without further leave to amend.

Dated: October 17, 1988

/s/ Ronald W. Rose
RONALD W. ROSE
UNITED STATES MAGISTRATE

[FILED DECEMBER 12, 1989]
[ENTERED DECEMBER 19, 1989]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D., Plaintiff,	)	Civil No. CV 89-2512-WPG(S)
v.	)	JUDGMENT
TED MILLARD, et al., Defendants.	)	

Pursuant to the order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate,

The complaint is dismissed without prejudice as to the following named Defendants: Ted Millard; Alfred Goodwin; Ronald Reagan; Edward Wallin; Roderick Ponath; Tom Johnson; William French Smith; Brea Hospital; Jean Rheinheimer; Everett Dickey; Myron Brown; Robert C. Bonner; Comprehensive Care Corporation, Inc.; Michael Capizzi; Herman Romm; Tim Miller; Wallace Wade; Leonard Levine; Lauren Reager; Richard Weatherspoon; Eric Bergstrom; James Penne; Alan Lieberman; Charles Wiggins; Maria Linville; Betty Linville; Phyllis Champion; Richard Garske; Ronald Rose; James McFarland; United of America; Otis Bowen; Central Intelligence Agency; Federal Bureau of Investigation; United States Department of Justice; County of Orange; Richard Joseph; Cecil Hicks; Michael Schumacher; Gale Paradise; Keith Monroe;

Laura Anderson; Louis Sullivan; Irving Kagen; Leon Kuhs; Howard Alt; Smith Medical Research; and James Turner.

Dated: December 12, 1989

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

[FILED DECEMBER 12, 1989]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D., Plaintiff, v. TED MILLARD, et al., Defendants.	Civil No. CV 89-2512-WPG(S) ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. Section 636(b)(1)(B), the Court has reviewed the pleadings and other papers herein and the Reports and Recommendations of the United States Magistrate and approves and adopts the Magistrate's findings, conclusions and recommendations. The Court has made a de novo determination of those portions of the report to which objection has been made.

IT IS ORDERED that Judgment be entered dismissing the complaint without prejudice as to the Defendants for whom dismissal is recommended in the Final Report and Recommendation of the Magistrate dated December 6, 1989.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Final Report and Recommendation, and the Judgment by United States Mail on Plaintiff and counsel for the parties.

Dated: December 12, 1989

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

[FILED NOVEMBER 9, 1989]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D., Plaintiff,	) Civil No. CV 89-2512-WPG(S)
v.	) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE IN A CIVIL RIGHTS CASE
TED MILLARD, et al., Defendants.	)

This Report and Recommendation is submitted to the Honorable William P. Gray, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

On April 26, 1989, Plaintiff filed a civil rights complaint in this Court. Plaintiff has failed to complete service of the summons and complaint on any of the Defendants. For that reason, on August 29, 1989, the Magistrate ordered Plaintiff to show cause on or before September 19, 1989, why this action should not be dismissed for failure to prosecute diligently. Plaintiff was advised that if he failed to file written objections to the dismissal prior to September 19, 1989, this would be considered a consent to such dismissal. On September 11, 1989, Plaintiff filed objections, a motion for continuance of the hearing, a motion for consolidation of this case with another, and related requests. On September 28, 1989, the Magistrate filed a written or-

der denying the motion for consolidation, granting the motion for a continuance, and granting Plaintiff until October 31, 1989, in which to file proofs of service of the summons and complaint on Defendants. In the order of September 14, 1989, Plaintiff was informed that his failure to file such proofs of service would result in dismissal of this action. To date, no proofs of service have been filed.

DISCUSSION

Civil actions which have been pending for an unreasonable period of time without any action having been taken may, after notice, be dismissed for want of prosecution. Local Rule 12.1. Although it has been more than six months since this action was filed, Plaintiff has failed to serve a copy of the summons and complaint on any defendant. Plaintiff was ordered to show cause on or before October 31, 1989, why this action should not be dismissed for failure to prosecute diligently. Plaintiff failed to file proofs of service of process on or before said date. Therefore, pursuant to Local Rule 12.1, the complaint and action should be dismissed without prejudice.

RECOMMENDATION

It is recommended that an Order be issued by the Court: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered dismissing the complaint and the entire action without prejudice.

Dated: November 9, 1989

/s/ Robert M. Stone
ROBERT M. STONE
United States Magistrate

[FILED DECEMBER 6, 1989]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D.,	)	Civil No.
	)	CV 89-2512-WPG(S)
Plaintiff,	)	
	)	FINAL REPORT AND
v.	)	RECOMMENDATION
	)	
	)	
TED MILLARD, et al.,	)	
	)	
Defendants.	)	

This Final Report and Recommendation is submitted to the Honorable William P. Gray, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States Court for the central District of California.

On November 13, 1989, the Clerk filed a Notice of Filing of Magistrate's Report and Recommendation and Lodging of Proposed Judgment, which was served on the parties, together with copies of the Magistrate's Report and Recommendation. On November 22, 1989, Plaintiff filed his objections to the Magistrate's Report and Recommendation.

CONCLUSION

Having fully considered Plaintiff's objections, the Magistrate reaffirms the findings and conclusions as set forth in the initial Report and Recommendation, except as follows: the Court file now reflects that the following named Defendants have appeared in the action: Malcolm Lucas, Harmon Scoville, Henry T. Moore, Marne A. Glass, Milton

C. Grimes, Howard Weitzman, Orange County Bar Association, and Wyman, Bautzer, Kuchel and Silbert. Therefore, the complaint should not be dismissed as to the aforementioned Defendants.

RECOMMENDATION

It is therefore the final recommendation of the Magistrate that an order be issued by the Court: (1) approving and adopting the initial Report and Recommendation as modified by this Final Report and Recommendation; and (2) directing that judgment be entered dismissing the complaint without prejudice as to the following named Defendants: Ted Millard; Alfred Goodwin; Ronald Reagan; Edward Wallin; Roderick Ponath; Tom Johnson; William French Smith; Brea Hospital; Jean Rheinheimer; Everett Dickey; Myron Brown; Robert C. Bonner; Comprehensive Care Corporation, Inc.; Michael Capizzi; Herman Romm; Tim Miller; Wallace Wade; Leonard Levine; Lauren Reager; Richard Weatherspoon; Eric Bergstrom; James Penne; Alan Lieberman; Charles Wiggins; Maria Linville; Betty Linville; Phyllis Champion; Richard Garske; Ronald Rose; James McFarland; United of America; Otis Bowen; Central Intelligence Agency; Federal Bureau of Investigation; United States Department of Justice; County of Orange; Richard Joseph; Cecil Hicks; Michael Schumacher; Gale Paradise; Keith Monroe; Laura Anderson; Louis Sullivan; Irving Kagen; Leon Kuhs; Howard Alt; Smith Medical Research; and James Turner.

Dated: December 6, 1989

/s/ Robert M. Stone
ROBERT M. STONE
United States Magistrate

[LODGED APRIL 17, 1990]
[FILED MAY 31, 1990]

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D.,	) CASE NO.
	) CV87-5387-JGD
Plaintiff,	) (RWR)
	)
vs.	) JUDGMENT
	)
DONALD SMALLWOOD, as an individual; LYNN WATERS, as an individual; LUPE TORRES, as an individual; KATHLEEN O'LEARY, as an individual; THOMAS CROSBY, as an individual; MAURICE EVANS, as an individual; CAROLYN ALBERTY, as an individual; JOHN TROTTER, as an individual; COUNTY OF ORANGE; COUNTY OF LOS ANGELES; MARK WRAY; as an individual; MALCOLM LUCAS; as an individual; JOHN RETTE, as an individual; ORANGE COUNTY MEDICAL ASSOCIATION, a California corporation; JAMES PADOVA, M.D.; MICHAEL KENNEDY, M.D.; FRANK AMATO, M.D.; MARY LITTRELL; KITTY LOVE;	)
	)
Defendants.	)

Pursuant to the Order of the Court adopting the findings, conclusions, and recommendations of the United States Magistrate,

IT IS ADJUDGED that a Judgment be issued dismissing the complaint, and the entire action, without prejudice.

Dated: May 29, 1990

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

[ENTERED_____NO JS-6]
[FILED MAY 31, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D., Plaintiff,	CASE NO. CV87-5387-JGD (RWR)
vs.	ORDER ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE
DONALD SMALLWOOD, as an individual; LYNN WATERS, as an individual; LUPE TORRES, as an individual; KATHLEEN O'LEARY, as an individual; THOMAS CROSBY, as an individual; MAURICE EVANS, as an individual; CAROLYN ALBERTY, as an individual; JOHN TROTTER, as an individual; COUNTY OF ORANGE; COUNTY OF LOS ANGELES; MARK WRAY; as an individual; MALCOLM LUCAS; as an individual; JOHN RETTE, as an individual; ORANGE COUNTY MEDICAL ASSOCIATION, a California corporation; JAMES PADOVA, M.D.; MICHAEL KENNEDY, M.D.; FRANK AMATO, M.D.; MARY LITTRELL; KITTY LOVE; Defendants.	

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Complaint, all of the records and files herein and the attached Reports and Recommendations

of the Magistrate. Objections to the Magistrate's Report and Recommendations have been filed herein. Having made a *de novo* determination of those portions of the Report and Recommendation to which objection has been made, the Court concurs with and adopts the findings and conclusions of the Magistrate.

IT IS THEREFORE ORDERED that a Judgment be entered (1) approving and adopting the Report and Recommendation, and (2) directing that Judgment be entered dismissing the Complaint, and the entire action, without prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve forthwith a copy of this Order and the Judgment of this date on the Plaintiff and counsel for Defendants.

Dated: May 29, 1990

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

[FILED MAY 11, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D., Plaintiff,	CASE NO. CV87-5387-JGD (RWR)
vs.	FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE
DONALD SMALLWOOD, as an individual; LYNN WATERS, as an individual; LUPE TORRES, as an individual; KATHLEEN O'LEARY, as an individual; THOMAS CROSBY, as an individual; MAURICE EVANS, as an individual; CAROLYN ALBERTY, as an individual; JOHN TROTTER, as an individual; COUNTY OF ORANGE; COUNTY OF LOS ANGELES; MARK WRAY; as an individual; MALCOLM LUCAS; as an individual; JOHN RETTE, as an individual; ORANGE COUNTY MEDICAL ASSOCIATION, a California corporation; JAMES PADOVA, M.D.; MICHAEL KENNEDY, M.D.; FRANK AMATO, M.D.; MARY LITTRELL; KITTY LOVE; Defendants.	

This Final Report and Recommendation and the attached Report and Recommendation are submitted pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and Gen-

eral Order 194 of the United States District Court for the Central District of California.

On April 19, 1990, the Clerk filed the Notice of Filing of Magistrate's Report and Recommendation and the Lodging of Proposed Judgment, which was served on the parties together with copies of the said Report and Recommendation.

Plaintiff has timely filed objections to the Report and Recommendation. The Magistrate has carefully read and considered the objections, but he is not persuaded to modify his recommendation in any respect.

A Report and Recommendation was issued in this case on April 19, 1990, recommending dismissal of this action, without prejudice, for failure to comply with court orders. At issue was an Order of September 29, 1987 (attached to the Report and Recommendation). Based on Krain's refusal to comply with this Order, the District Court ultimately dismissed his action with prejudice. Krain appealed and the Ninth Circuit, after considering the matter, remanded the case for further consideration, as a possibly incompetent plaintiff should not have his case dismissed on the merits. See *Krain v. Smallwood, et al.*, 880 F.2d 1119, 1129 (9th Cir. 1989).

The Court of Appeals ruled that, on remand, the District Court could exercise its discretion to (1) conduct a competency hearing, (2) appoint a lawyer to represent Krain [although Krain has never asked for one] or (3) dismiss without prejudice. Krain's appeal was decided July 26, 1989, almost ten (10) months ago. Yet Krain has never indicated, in the intervening months, any desire to comply with the Court's September 29, 1987 Order. Instead, he has remained silent. He has never attempted to schedule

a hearing, never attempted to produce any of the documentation required by the September 29, 1987 Order which was a prelude to initiating a competency examination by a psychiatrist, nor has he even inquired of the Court as to what action, if any, he should take. Instead, he has remained silent and has failed to take any action. Now, after the Report and Recommendation has issued, determining that his case should now be dismissed without prejudice, he suddenly awakens and wants an opportunity to comply. No stay of the September 29, 1987 Order was ever entered. Indeed, Plaintiff seems to be under the impression that the Court need enter "a current 1990 Order" before he is required to do anything. Krain's arguments are unavailing. He has consistently refused to comply with this Court's competency Orders in this and related cases. The Court believes that Krain is insincere in his statements and will not comply, under any circumstances. In any event, it is too late. His total failure, to date, to even attempt compliance, leads the Court to this conclusion. In the exercise of discretion, having considered the entire matter, the Court should dismiss the action without prejudice.

Krain's vague and undocumented allegations that the Magistrate is somehow biased against him and is a "party" to other Krain litigation, are frivolous and without merit. The Magistrate has never been served with process in *any* case involving Krain. Indeed, naming, as a defendant, the judicial officers who rule against him is merely one of his tactics in an effort to forum shop for a judge whom he believes will, someday, rule in his favor. Krain has filed more than one motion to disqualify this Magistrate—none has been successful. Plaintiff's objections, therefore, are not well taken.

IT IS THEREFORE THE FINAL RECOMMENDATION OF THE MAGISTRATE that an Order be issued by the Court (1) approving and adopting this Report and Recommendation, and (2) directing that judgment be entered dismissing the Complaint and the entire action without prejudice.

Dated: May 11, 1990

/s/ Ronald W. Rose
RONALD W. ROSE
United States Magistrate

[LODGED JUNE 6, 1990]
[ENTERED JULY 11, 1990]

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D., Plaintiff, v. BRENT SUNDIN, et al., Defendants.	No. CV 86-4289-LEW(G) JUDGMENT

LAWRENCE S. KRAIN, M.D., Plaintiff, v. AUGUSTUS KASPER, et al., Defendants.	No. CV 86-5881-LEW(G)

IT IS ADJUDGED that the action is dismissed without prejudice as to defendants MAURICE EVANS, WALLACE WADE, BRAD GATES, ROBERT FITZGERALD, JOHN GIER, HAROLD HOUGHTON, FRED SHEFFIELD, JERRY HODGES, RICHARD BEACOM (defendants in CV86-4289), defendants EVERETT DICKEY, JAMES P. SLACK, CHARLOTTE SAITO, RONI NADLER, KEITH MONROE (defen-

dants in CV86-5881), and defendants JAMES ALFANO, and the COUNTY OF ORANGE.

IT IS FURTHER ADJUDGED that the action is dismissed without prejudice, as to the non-moving defendants; in CV 86-4289, they are BRENT SUNDIN, GERALD P. O'DONNELL, TIM MILLER, and MICHAEL CAPIZZI; in CV86-5881, they are AUGUSTUS KASPER, MARIA LINVILLE, BETTY LINVILLE, LUIS R. VARGAS, DON Z. MILLER, JAY J. COHN, SINGH CHUNG, S. J. MARTIN, JERRY FIELDS, JIM DIXON and JIM WILLETT.

This judgment is applicable to all defendants in the above-entitled actions, CV 86-4289 and CV 86-5881 and are dismissed without prejudice in their entirety.

Dated: 11 July 90

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
United States District Judge

[FILED JUNE 6, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE S. KRAIN, M.D.,	)	No. CV 86-4289-LEW(G)
	)	
Plaintiff,	)	REPORT AND
	)	RECOMMENDATION OF
v.	)	UNITED STATES
	)	MAGISTRATE
	)	
BRENT SUNDIN, et al.,	)	
	)	
Defendants.	)	

LAWRENCE S. KRAIN, M.D.,	)	No. CV 86-5881-LEW(G)
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	
AUGUSTUS KASPER, et al.,	)	
	)	
Defendants.	)	

This Report and Recommendation is submitted pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) (1982) and General Order No. 194 of the United States District Court for the Central District of California.

The two actions referenced above represent part of a litigation against several dozen defendants commenced by the plaintiff in 1986. The issue that is now before the court in both actions is that of the plaintiff's mental competency and ability to proceed pro se. On April 15, 1988, Judge Marshall, the judge assigned at that time to the

consolidated cases[1], issued an order[2] pursuant to Federal Rule of Civil Procedure 17(c) requiring plaintiff to submit documentation of his mental competence, as well as a declaration listing all state and federal actions filed in the previous five years to which plaintiff had been a party together with a description of those actions. On July 14, 1988 Judge Marshall dismissed both actions with prejudice sua sponte, for plaintiff's failure to comply with the court order of April 15. The plaintiff appealed to the Ninth Circuit, who reversed and remanded the case on July 26, 1989. The Circuit Court held that a court may not dismiss with prejudice for failure to comply with a court order where a substantial question exists as to the competence of an unrepresented party. *Krain v. Smallwood,* 880 F.2d 1119, 1121 (9th Cir. 1989). The Court added, however, that the District Court may dismiss a case without prejudice if a party refuses to cooperate.

On March 12, 1990, defendants Dickey, Slack, Evans, Wade, Gates, Saito, Alfano, Fitzgerald, Gier, Haughton, Sheffield, Hodges, O'Leary, Johnson, Mullins, Beacom, and the County of Orange moved for dismissal without prejudice of the Amended Complaint in Case no. CV86-4289 pursuant to Local Rule 17.4, for plaintiff's failure to comply with Fed. R. Civ. P. 17(c). On April 12, 1990, defendants Orange County Register, Freedom Newspapers, Bob Ostman, and Duffern Helsing (defendants in another related case, CV87-1825 CBM(RWR)) moved to join in the Motion

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[1] The two cases that appear in the caption above, as well as *Krain v. Lee,* CV87-368 CBM-(RWR), *Krain v. Gualtieri,* CV87-569-CBM-(RWR), *Krain v. Roth,* CV87-624 CBM-(RWR), *Krain v. Times Mirror Corp.,* CV87-1825-CBM-(RWR), and *Krain v. Freedom Newspapers,* CV87-2215-CBM-(RWR).

[2] The order affected the following cases: CV86-4289, CV86-5881, CV87-368, CV87-569, CV87-624.

to Dismiss filed by the defendants in CV86-4289. On April 25, 1990, defendants Monroe and Nadler also joined in the Motion to Dismiss, as did defendant Mast on May 3.

Listed as defendants in the First Amended Complaint in CV86-4286 are: Brent Sundin, James Alfano, Richard Beacom, Robert Fitzgerald, Gerald P. O'Donnell, Tim Miller, Brad Gates, Harold Houghton, Wallace Wade, Maurice Evans, Michael Capizzi, Jerry Hodges, John Gier, Fred Sheffield, and the County of Orange. Defendants Sundin, O'Donnell, Miller, and Capizzi did not join in the Motion to Dismiss. Defendants Dickey, Slack, Saito, O'Leary, Johnson, and Mullins (who joined in the Motion to Dismiss) are not defendants in CV86-4289, but in CV86-5881 or other related actions. Of the named defendants in CV86-4289, B. Sundin, G. O'Donnell, T. Miller, and M. Capizzi have not joined in the Motion to Dismiss that is now before the Court. All defendants were served with process.

Listed as defendants in the Complaint in CV86-5881 are: Augustus Kasper, Roni Nadler, Maria Linville, Betty Linville, Luis Vargas, James Alfano, Everett Dickey, Don Miller, Keith Monroe, Jay Cohn, James Slack, Charlotte Saito, Singh Chung, S.J. Martin, Jerry Fields, Jim Dixon, Jim Willett, and the County of Orange. Of these, only R. Nadler, J. Alfano, E. Dickey, K. Monroe, J. Slack, C. Saito, and County of Orange joined in the Motion to Dismiss. All parties were served with process.]

The plaintiff filed an opposition to the Motion to Dismiss on March 21, 1990. In his opposition, he requested a competency hearing conducted by a psychiatrist with "whom he is not in litigation" and who does not belong to the Orange County or the Los Angeles County Medical Associations, with whom he is in litigation. He included a list

of psychiatrists, and stated that the action should not be dismissed as he is willing to be examined. He failed to address his non-compliance with the Court's April 15, 1988 Order.

A hearing on the Motion to Dismiss was set for Tuesday, May 22. On May 21, the plaintiff filed a declaration stating that he was unable to appear at the hearing for medical reasons. No declaration from any physician treating him was filed.

Plaintiff's most recent maneuver is a case of too little, too late. It is merely another attempt to sidestep the requirements of Judge Marshall's now two-year-old order. While we are mindful of the mandate imposed by the Circuit in their decision in this case, we must now resort to the exception they provided for instances where a party refuses to cooperate. A recalcitrant plaintiff cannot claim the privileges due him as a litigant in the United States Courts while he dodges the obligations imposed on him. The Court has expressed its requirements clearly, in a manner that must surely be comprehensible to one who has reached the level of education necessary to obtain an M.D., and despite the considerable amount of time that has lapsed since that order, the plaintiff has not complied.

Accordingly, the motion to dismiss without prejudice of defendants Evans, Wade, Gates, Fitzgerald, Gier, Houghton, Sheffield, Hodges, Beacom (defendants in CV86-4289), defendants Dickey, Slack, Saito, Nadler, Monroe (defendants in CV86-5881), and defendants Alfano, and the Coun-

ty of Orange, defendants in both cases, is granted for plaintiff's failure to comply with the April 15, 1988 order.[3]

In addition, the Court finds that the interests of justice dictate dismissal without prejudice of the non-moving defendants in CV86-4289 and CV86-5881 as well, on the same grounds as above, plaintiff's failure to comply with Court order. The non-moving defendants in CV86-4289 are B. Sundin, G. P. O'Donnell, T. Miller, and M. Capizzi. The non-moving defendants in CV86-5881 are A. Kasper, M. Linville, B. Linville, L. Vargas, D. Miller, J. Cohn, S. Chung, S. J. Martin, J. Fields, J. Dixon, and J. Willett.

Dated: June 6, 1990.

/s/ Ralph J. Geffen
RALPH J. GEFFEN
United States Magistrate

REPORTS AND RECOMMENDATIONS ARE NOT APPEALABLE TO THE COURT OF APPEALS, BUT MAY BE SUBJECT TO THE RIGHT OF ANY PARTY TO FILE OBJECTIONS AS PROVIDED IN LOCAL RULES GOVERNING THE DUTIES OF THE MAGISTRATES AND REVIEW BY THE DISTRICT JUDGE WHOSE INITIALS APPEAR IN THE DOCKET NUMBER. NO NOTICE OF APPEAL PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE SHOULD BE FILED UNTIL ENTRY OF THE JUDGMENT OF THE DISTRICT COURT.

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[3] Also joining in the motion to dismiss were defendants in other cases, O'Leary, Johnson, Mullins, Orange County Register, Freedom Newspapers, B. Ostman, and D. Helsing.

Margaret Johnson is a defendant in CV87-368, Timothy Mullins in CV87-624, Kathleen O'Leary, Orange County Register, Freedom Newspapers, B. Ostman, and D. Helsing in CV87-1825. These cases were formerly referred to Magistrate Rose.